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FILED

NOV 15 2005

No. 05-342

In the
Supreme Court of the United States

JAMES J. HAYES, on behalf of himself and all others similarly situated, and THOMAS BOOTS, on behalf of himself and all others similarly situated,

Petitioners,

- v. -

CROWN CENTRAL LLC, MICHAEL F. DACEY, STANLEY A. HOFFBERGER, BARRY L. MILLER, FRANK B. ROSENBERG, HENRY A. ROSENBERG, JR., JOHN E. WHEELER, JR., JACK AFRICK, HAROLD RIDLEY, CREDIT SUISSE FIRST BOSTON CORPORATION and ROSEMORE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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ARGUMENT

Respondents' harmless error in filing their brief in opposition with a qualified affidavit of mailing illustrates excusable neglect.

Respondents' brief in opposition was required to be filed no later than October 17, 2005. On that date Lantagne Legal Printing, Inc. of Richmond, Virginia, as respondents' agent, filed the brief in opposition by depositing it in the United States Postal Service. Because the envelope in which the brief was mailed contained only a commercial postage meter label, Lantagne Legal Printing, Inc. filed an affidavit that the brief in opposition was deposited in the United States Postal Service on October 17, 2005. Appendix hereto. That affidavit was qualified and stated that the statement tnat the brief in opposition was mailed on October 17, 2005, was "true and exact to the best of my knowledge and belief." (Emphasis added).

Such an affidavit does not comply with this Court's Rule 29 which provides in paragraph 2 that . . . "If the postmark is missing or not legible, the Clerk will require the person who mailed the document to submit a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the details of the mailing and stating that the mailing took place on a particular date within the permitted time."

An affidavit that contains the qualification that the affidavit is true and exact to the best of the knowledge and belief of the affiant does not comply with Rule 29. The affidavit must be unqualified. See, e.g., 28 U.S.C. § 1746 which provides that a declaration must state:

> I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct.

The brief in opposition undoubtedly was deposited in the mail on October 17, 2005 because petitioners' counsel received their copies of the brief in Birmingham, Alabama on October 19, 2005. The submission of the qualified affidavit was harmless error

made in good faith by the respondents' agent, and the Clerk of this Court quite properly treated the brief in opposition as having been filed on October 17, 2005.

The Lantagne affidavit also was intended to constitute proof of service pursuant to paragraph 5 of Rule 29. The affidavit did not comply with subparagraph 5(c) of Rule 29 which requires that the notarized statement of service be unqualified. Again, this was a harmless error.

Harmless error in the district court is governed by Rule 61 of the Rules of Civil Procedure which states that:

> . . . The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Harmless error in the courts of appeal and in this Court is subject to 28 U.S.C. § 2111 which states:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Section 2111 of 28 U.S.C. and F.R.C.P. Rule 61 clearly require that an error by the court or by any party is to be ignored if it does not prejudice or affect the substantial rights of a party. Similarly, an attorney's neglect which (i) does not prejudice anyone, (ii) does not delay the judicial proceedings and (iii) does not show bad faith should be considered excusable neglect. The hard line concept of excusable neglect followed by six circuits should be rejected in favor of the flexible concept followed by five circuits..

CONCLUSION

For the reasons stated in the petition, the reply brief and this supplemental brief, the petition should be granted.

Respectfully submitted,

E. M. Selfe

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APPENDIX

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Respondents.

AFFIDAVIT

I, Richard Markell, of Lantagne Legal Printing, Inc., attest that the following statement is true and exact to the best of my knowledge and belief:

On this 17th day of October, 2005, I, Richard Markell, hereby certify that the attached Brief in Opposition to Petition for Writ of Certiorari was delivered, via United States Postal Service, First Class, Certified Mail, to the Supreme Court of the United States. I further certify that I have served by mail this same date the required copies to the parties listed below:

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COMMONWEALTH OF VIRGINIA)
CITY OF RICHMOND) to-wit:

Richard Markell appeared before me this 17th day of October , 2005, and attested that the foregoing affidavit is true and exact to the best of his knowledge and belief.

My commission expires: 07/31/06

Anthony G. Lantagne, Notary Public